NO. 83-1802

IN THE

Supreme Court Of The United States

October Term, 1983

CHARLES L. DANIEL, et al.,
Petitioners

vs.

RUSH PETTWAY, et al.,
Respondents
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent
AMERICAN CAST IRON PIPE COMPANY,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

INFORMATION REQUIRED BY RULE 28.1

American Cast Iron Pipe Company, a respondent herein, is a corporation incorporated under the laws of the State of Georgia. American Cast Iron Pipe Company is not a subsidiary of any other company, and all of its subsidiaries are wholly owned.*

*In his List of Parties, counsel for petitioners lists sixty individuals as plaintiffs-appellants in the court below. One person listed, M. L. Walls, withdrew his appeal on May 27, 1983. Two class members, Robert Caldwell and Melvin Carson, have no standing since they did not file any objections in the District Court. Thus, the present petition was filed on behalf of fifty-seven class members, less than 2½% of the plaintiff class, which includes over 2,700 employees.

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – (Continued)

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STATEMENT OF THE CASE

This race discrimination class action was filed on May 13, 1966 under the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981. The case has had a long and tortuous history spanning a full trial, an attempted full settlement, four separate appeals to the United States Court of Appeals for the Fifth Circuit, a later settlement of the injunctive aspects of the case, the filing of a petition for writ of mandamus with

the Fifth Circuit, an appeal to the Eleventh Circuit Court of Appeals, the filing of a petition for a writ of certiorari with this Court,[1] and finally, a settlement of the monetary aspects of the case, the subject of the decision below. In the interest of brevity, the prior history will be substantially abbreviated.

After a prior appeal to the United States Court of Appeals for the Fifth Circuit on procedural grounds, *Dent v. St. Louis-San Francisco Railway Co.*, 406 F.2d 399 (5th Cir. 1969) (a consolidated appeal including the *Pettway* case), and an appeal from the discharge of one of the named plaintiffs, *Pettway v. American Cast Iron Pipe Company*, 411 F.2d 998 (5th Cir. 1969), the class action charges were tried in the district court in October, 1971. The district court granted injunctive relief but declined to award any back pay. *Pettway v. American Cast Iron Pipe Company*, 7 FEP 1010 (N.D. Ala. 1972).

On appeal, the Fifth Circuit reversed the judgment of the district court and found that the proper relief on remand should include an award of back pay. *Pettway v. American Cast Iron Pipe Company*, 494 F.2d 211 (5th Cir. 1974) (*Pettway* III). The court in *Pettway* III also urged the parties to "consider negotiating an agreement" with respect to back pay. 494 F.2d at 258.

On remand from *Pettway* III, a settlement of the monetary issues was reached, and on June 12, 1975, the district court entered a judgment awarding back pay in the amount of $1,000,000. In *Pettway v. American Cast Iron Pipe Company*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979) (*Pettway* IV), the Fifth Circuit again reversed and remanded, holding that the district court's approval of the back pay settlement was an abuse of discretion

[1]The petition is pending, and with the consent of this Court, will not be considered unless the Court reverses the Eleventh Circuit's judgment affirming the district court's approval of the present settlement.

since the active named plaintiffs unanimously disapproved of the settlement and 70% of the back pay subclass also objected. The court again encouraged the parties to reach a settlement. 576 F.2d at 1213.

On remand from *Pettway* IV, the parties settled the injunctive aspects of the case. On July 16, 1980, that consent decree was approved by the district court and entered on the record. In its Findings of Fact and Conclusions of Law entered on July 25, 1980, the district court stated that if the parties could not reach a settlement of the remaining monetary issues, the court would "proceed forthwith with all possible speed to adjudicate the back pay claims of all affected employees." (App. 5). No appeal was taken from the 1980 Consent Decree.

After settlement efforts were unsuccessful, the district court held a hearing with the parties on July 17, 1981, and entered an Order of Referral to Special Master which referred the entire back pay issue for trial on an individual-by-individual basis. On or about August 5, 1981, plaintiffs filed a Petition for Writ of Mandamus attacking the individual-by-individual approach to adjudicating back pay claims at Stage II under the order of reference. Plaintiffs' petition was denied by the Fifth Circuit on August 19, 1981. (App. 8).

On August 19, 1981, plaintiffs also filed a notice of appeal from the Order of Referral to Special Master, raising the same objections to the individual-by-individual approach to adjudicating back pay claims as were previously raised in their Petition for Writ of Mandamus. The Eleventh Circuit accepted the interlocutory appeal and vacated the order of reference. *Pettway v. American Cast Iron Pipe Company*, 681 F.2d 1259 (11th Cir. 1982) (*Pettway* V). The court held, *inter alia*, that a classwide approach to adjudicating back pay claims was required unless the district

court "determines that relief *cannot* be given upon a class-wide basis." 681 F.2d at 1266 (emphasis in original). In a companion case, the EEOC was reinstated as an intervenor in this action. *Pettway and EEOC v. American Cast Iron Pipe Company*, 681 F.2d 1269 (11th Cir. 1982).

The defendant then filed a Petition for Writ of Certiorari with this Court. *American Cast Iron Pipe Company v. Pettway*, No. 82-1074 (1982). The petition is pending, and with the consent of the Court, will not be considered unless the Court reverses the Eleventh Circuit's judgment affirming the district court's approval of the present settlement.

In January, 1983, the attorneys for the parties, after extensive consultations with their respective clients and experts, reached a settlement of all the remaining monetary issues in the case. The agreement reached provides for a total payment from the defendant of $3,983,401.91 in satisfaction of all monetary claims for racial discrimination and fees and expenses which have been asserted as a part of this action. (App. 9).

On March 23, 1983, after reviewing the terms of the proposed Consent Decree, the proposed Notice to be sent to each plaintiff and class member, the applicable law, and arguments of counsel, the district court entered its Order Conditionally Approving Settlement Class and Tentatively Approving Consent Decree. In its Order the court (1) tentatively approved the settlement class as all black employees at defendant's Birmingham, Alabama plant who were employed as of, or hired subsequent to, July 2, 1965 to the present; (2) tentatively approved the proposed Consent Decree based on the findings that (a) there had been a showing that the settlement is fair, reasonable and adequate sufficient to warrant submitting it to the class and (b) the terms of the proposed Consent Decree were reached through extensive arms-length negotiation between the par-

ties. The court also ordered the defendant to send a copy of the approved Notice to each plaintiff and class member. Finally, the district court set a hearing on May 12, 1983 to hear objections to the proposed Consent Decree and to determine whether the proposed Consent Decree should be finally approved. Extensive Findings of Fact and Conclusions of Law were also entered on March 23, 1983, which set forth the court's reasons for giving preliminary approval of the proposed Consent Decree.

Approximately 110 class members, out of a class of over 2,700 employees, and thus less than 5% of the settlement class, filed timely objections to the proposed Consent Decree on or before April 22, 1983. At the fairness hearing held on May 12, 1983, a number of the objectors were represented by their own counsel, and the objectors and their attorneys were given ample opportunity to present objections to the court. (App. 25). On May 12, 1983, precisely seventeen years after the action was filed, the district court entered its Final Judgment and Rule 54 Certificate giving final approval of the proposed Consent Decree tentatively approved on March 23, 1983. (App. 1). On May 23, 1983, some objectors, through their attorneys, filed petitions for rehearing and motions for new trial. Prior to the ruling on the post-trial motions, 10 class members withdrew their objections. The post-trial motions were overruled on June 23, 1983. On June 23, 1983, the district court also entered extensive Findings of Fact and Conclusions of Law in support of his approval of the Consent Decree and in support of his denial of the post-trial motions. (App. 3-35). On July 22, 1983, a notice of appeal was filed on behalf of 58 class members, out of a class of over 2,700 employees. Thus, less than 2½% of the plaintiff class appealed the district court's approval of the settlement.

On appeal, the Eleventh Circuit affirmed the judgment

of the district court approving the settlement. *Pettway v. American Cast Iron Pipe Company*, 721 F.2d 315 (11th Cir. 1983) (App. 36-39). In reaching its holding that the district court did not abuse its discretion in approving the settlement, the court stated:

> We have carefully considered the record of the fairness hearing conducted by the trial court, and the court's full discussion of each issue raised at the hearing. As stated by the court at the conclusion of the hearing, the court had been aware of the many issues in the case for a period of 17 years, and it showed itself to be completely aware of the relatively small number of objectors who made competing claims as to the amounts they should have received in the final settlement.
>
> We find that the trial court had before it more than sufficient evidence upon which it could, as it did, conclude that the settlement was "fair and reasonable."
>
> We particularly note that, once all of the legal complications in the case had finally been disposed of, during the many trips of this case to the courts of appeals of this and the Fifth Circuit, the trial court demonstrated unusual skill in apprehending each nuance that was even suggested by the present objectors, the appellants here. We conclude that the final determination of the trial court, bolstered to some extent by the agreement, though without the signature, of the Equal Employment Opportunity Commission, cannot be faulted as having been an abuse of the trial court's discretion.[2]

721 F.2d at 316 (App. 38-39).

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[2]A district court's decision in approving a class action settlement "will be overturned only upon a *clear showing* of abuse of discretion." *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983) (emphasis added); *Pettway* IV, 576 F.2d at 1214. The abuse of discretion standard is also applicable in reviewing the distribution of a settlement. *Holmes v. Continental Can Co., supra.*

Petitioners' petition for rehearing and rehearing *en banc* was denied on January 30, 1984. (App. 40-41).

REASONS FOR DENYING THE WRIT

Petitioners have failed to present any "special and important reason" for the issuance of a writ of certiorari. Sup. Ct. Rule 17. The decision by the court below is factually sound, based on sound legal principles, and is not in conflict with any decision of another federal court of appeals or any decision of this Court. The court below simply held that the district court did not abuse its discretion in approving the settlement, a decision which does not present any issue of substantial importance warranting consideration by this Court.

A. Since Petitioners' Argument that the Consent Decree is Defective Because it Failed to Contain an Opt-Out Provision for Dissatisfied Claimants Was Not Raised in the District Court, This Court Should Not Review the Issue.

Petitioners argue that the Court should issue a writ of certiorari because the Consent Decree entered herein does not contain an opt-out provision for dissatisfied class members. Presumably, petitioners contend that the district court abused its discretion by approving the settlement of this Rule 23 (b) (2) class action without providing an opportunity for class members to opt-out. The petitioners fail to state, however, that this issue was not raised in any form or fashion in the district court, and none of the petitioners sought to opt-out of the settlement.

In its Findings of Fact and Conclusions of Law, the district court discussed the right to opt-out even though the issue was not raised in the written objections to the Consent Decree or at the fairness hearing. The court stated:

In *Pettway* IV the Court of Appeals considered the question of opting out at some length. It concluded with a statement that "on remand if another settlement is reached, the district court should provide those claimants who decide to opt-out of the settlement with an opportunity to assert their individual claims in this action." *Id.* 576 F.2d at 1220. The attorney for the class brought this provision of the prior mandates to the attention of the class in his meetings with them in January, February, March and April of this year. It is undisputed that he informed class members in all of these meetings that he would assist them in seeking to opt-out of the settlement if they desired the opportunity to present their individual claims for greater back-pay. After formal notice to the class was mailed to each class member, the plaintiffs' attorney met individually with scores of class members in his office prior to the May 12, 1983 fairness hearing. In these meetings the opportunity to opt-out was once again explained to the class members, including many of the ones now objecting to the proposed settlement.[3] Presumably the attorneys for the objectors also read the mandate in *Pettway* IV and informed their clients of the opportunity to opt-out of the settlement and proceed individually with a claim for a greater back-pay award.

Despite the repeated notice to the class of the opportunity to opt-out of the settlement there has not been a single request to do so by any member of the class.[4] Instead, the objecting class members have apparently decided that the opportunity to opt-out is something that is not in their best interests. According to the papers before the Court and the testimony, this decision was made with the advice and counsel of the objectors' attorneys.

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[3]Counsel for petitioners herein admitted this at the fairness hearing. (Tr. 63).

[4]*Compare Holmes v. Continental Can Co.*, 706 F.2d 1144, 1151 (11th Cir. 1983) ("certain class members attempted repeatedly to opt out").

> The Court and the class representatives, of course, cannot force the objecting class members to seek the opportunity to opt-out of the settlement and pursue their individual claim of entitlement to more back-pay. The decision in *Pettway* IV only mentions the "opportunity" to opt-out of the settlement. In the circumstances now before the Court that opportunity has been provided and no class member has expressed any interest in it. *In the absence of any request to opt-out and any objection based on this ground, the Court concludes that the issue is moot.*

(App. 29-30) (emphasis added).

The petitioners did not attack this finding as clearly erroneous in the court below, nor have they attacked this finding as clearly erroneous in their petition to this Court. *See Pullman-Standard v. Swint*, 456 U.S. 273 (1982). Moreover, since the opt-out issue was not raised in the district court, and for that reason not considered by the Eleventh Circuit, the issue should not be considered by this Court. *See Dothard v. Rawlinson*, 433 U.S. 321, 323 n.1 (1977) ("Not having been raised in the District Court, that issue is not before us"). *See also Reed v. General Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983) (since "the objectors did not mention [the issue] in either the written objections or at the fairness hearing . . . this Court will not consider the issue"); *United States v. Reiz*, 718 F.2d 1004, 1007 (11th Cir. 1983) ("issues not raised and preserved in the trial court will not be considered on appeal").[5]

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[5]Since the present settlement is a classwide settlement, and no class member opted out of the settlement, defendant's Motion to Require Subclass Members to Affirm or Reject Back Pay Settlement Awards, and in the Latter Event to Return the Awards to the Company, filed on May 20, 1981, is now moot. The district court so ruled at the fairness hearing. (Tr. 17). Accordingly, the statement on page 8 of the petition that the court took no action on this motion is inaccurate.

B. The Other Issues Raised by Petitioners Are Not Issues of Substantial Importance Warranting Consideration by this Court.

Another reason advanced by petitioners for granting the writ is that at the fairness hearing, the proponents of the settlement submitted affidavits from experts containing economic data to show that the settlement is fair, reasonable and adequate rather than producing live witnesses. The law is well settled, however, that the approval of a consent decree "requires a determination that the proposal represents a reasonable and factual determination based on the facts of record, whether established by evidence, *affidavit* or stipulation." *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (*en banc*) (emphasis added). *See also Weinberger v. Kendrick*, 698 F.2d 61, 69 & 71 (2d Cir. 1982) (affidavits submitted by proponents of settlement); *Williams v. City of New Orleans*, 543 F.Supp. 662, 673 (E.D. La. 1982), *rev'd on other grounds*, 694 F.2d 987 (5th Cir. 1983) (*en banc*) (same); *Miller v. Republic Nat. Life Ins. Co.*, 559 F.2d 426, 429 (5th Cir. 1977) (same); *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 620 (N.D. Cal. 1979) (same).[6]

Moreover, none of the objectors or their attorneys called Mr. Wiggins, class counsel, who was present at the fairness hearing for cross-examination, nor did they call defendant's expert who was also in Birmingham and available for cross-examination. (App. 13; 27). Nor did they call the named

[6]The petitioners' contention that Mr. Wiggins' affidavit is not a part of the record since it was never expressly ruled on is totally without merit. Mr. Wiggins' affidavit was in fact received in evidence at the fairness hearing since no objection was brought to the attention of the district court, (App. 27), and the court relied on it extensively in its Findings of Fact and Conclusions of Law entered on June 23, 1983 in support of his approval of the Consent Decree. In the absence of any specific objection, the petitioners waived their objection to the admissibility of the affidavit. *See* Rule 103, Fed.R. Evidence. *See also United States v. Morton*, 591 F.2d 483, 484 (8th Cir. 1979).

plaintiffs to the stand even though they were present at the fairness hearing. Finally, after testimony was concluded at the fairness hearing, the district court stated in detail some of the reasons why it considered the present settlement, fair, reasonable and adequate.[7] (Tr. 115-19). The district court adjourned the hearing without objections from either the objectors or their attorneys. None of the attorneys for the objectors nor any other class member indicated to the court in any way that they had other evidence to submit in support of their objections. Nor did they request a continuance of the fairness hearing to enable them to conduct discovery or gather other evidence.[8] (App. 25; 28). As the Eleventh Circuit stated "[w]e find that the trial court had before it more than sufficient evidence upon which it could, as it did, conclude that the settlement was fair and reasonable."[9]

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[7]Thereafter the district court entered detailed Findings of Fact and Conclusions of Law stating again why it found the settlement to be fair, reasonable and adequate and the objections without merit. (App. 3-35). As the Eleventh Circuit recognized, the trial court "showed itself to be completely aware of the relatively small number of objectors who made competing claims as to the amount they should have received in the final settlement . . ." and "demonstrated unusual skill in apprehending each nuance that was even suggested by the present objectors." 721 F.2d at 316 (App. 38).

Furthermore, the petitioners' contention that the district court placed the burden of proof on the objectors at the fairness hearing is simply not true and was rejected by the court below. As evidenced by the court's written Findings of Fact and Conclusions of Law, at all times in the proceedings in the district court, the burden of showing that the terms of the settlement were fair, reasonable and adequate was on the proponents. (App. 10; 13; 23; 27; 35).

[8]The statement on page 10 of the petition that certain computer printouts were not furnished by the proponents of the settlement to counsel for the objectors is patently false. Mr. Coleman admitted at the fairness hearing that Mr. Wiggins made available to him, prior to the hearing, a computer printout containing the calculations of plaintiffs' expert and other documents for Mr. Coleman to examine in preparation for the fairness hearing. (Tr. 64) (App. 12; 24).

[9]Thus, the statement on page 9 of the petition that the district court's findings of fact are not supported by evidence in the record is also without merit.

721 F.2d at 316 (App. 38). Under these circumstances, there can be no doubt that this issue does not present any question of substantial importance that merits consideration by this Court.

The petitioners also contend that the class representatives and the attorney for the class did not provide adequate representation of the interests of every member of the class. This contention was expressly rejected by the district court, (App. 16; 19; 35), and while argued extensively by petitioners in the court below, the Eleventh Circuit did not find that this finding of fact was clearly erroneous.[10] *See Pullman-Standard v. Swint*, 456 U.S. 273 (1982). Accordingly, this purely factual issue does not present any question of substantial importance that merits consideration by the Court.

Finally, the petitioners contend there was something wrong with class counsel and the defendant's attorney working together in preparation for the fairness hearing after having negotiated for months over the terms of the settlement and in jointly preparing the documents in support of the settlement. Of course they worked together; they were the proponents of the settlement! The petitioners' argument fails to distinguish between conciliation and collusion. In any event, this contention by petitioners was also raised in the court below and rejected. Like the other issues raised by petitioners, this final issue does not present any special and important reason for the issuance of a writ of certiorari.

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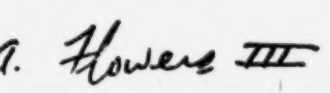
[10]Defendant-Respondent adopts the argument in plaintiffs-respondents' brief in opposition concerning the adequacy of representation by the named plaintiffs and class counsel and incorporates that argument herein by reference.

CONCLUSION

In this case, the Eleventh Circuit held that far from abusing its discretion, the district court proceeded with commendable care and fairness in approving a fair, reasonable and adequate settlement of this hotly contested, complex lawsuit. This case does not present any issue of substantial importance that merits consideration by this Court. This is purely an abuse of discretion case in which the Eleventh Circuit applied well established principles of law. Accordingly, the petition should be denied.

Respectfully submitted,



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PROOF OF SERVICE

I, F. A. Flowers, III, a member of the Bar of this Court, as counsel of record for respondent herein, American Cast Iron Pipe Company, hereby certify that three copies of the above and foregoing Brief in Opposition have been served by United States mail, postage prepaid and properly addressed upon Ralph E. Coleman, 2175 11th Court South, Birmingham, Alabama 35205; Ronald L. Spratt, Suite 3200, Smith Towers, 1929 Third Avenue North, Birmingham, Alabama 35203; Robert L. Wiggins, Jr., Suite 716, Brown-Marx Building, 2000 1st Avenue North, Birmingham, Alabama 35203; Bo Duplinsky, Office of General Counsel, Equal Employment Opportunity Commission, 2401 "E" Street, Washington, D.C. 20506; and the Solicitor General, Department of Justice, Washington, D.C. 20530 on this the 22nd day of May, 1984.

It is also certified that all parties required to be served have been served.

F. A. Flowers, III

F. A. Flowers, III

Sworn to and subscribed before
me this 22nd day of May, 1984.

Susan S. Turner

Notary Public